LOH YOON SANG

v.

IVORY PEARL SDN BHD

HIGH COURT MALAYA, IPOH
BALIA YUSOF JC
[ORIGINATING SUMMONS NO: 24-794-2002]
2 JUNE 2003

COMPANY LAW: *Directors - Accounts - Application for inspection of accounts of company - Principles applicable - Whether director intended to injure company - Whether application ought to be granted - Companies Act 1965, s. 167(3)*

COMPANY LAW: *Directors - Agency - Accounts - Appointment of company auditor as agent to assist director in inspecting accounts of company - Principles applicable - Whether director required such assistance - Whether auditor intended to abuse information and injure company - Companies Act 1965, s. 167(6)*

This was an application, pursuant to s. 167 of the Companies Act 1965 ('the Act'), by the plaintiff – a director and chairman of the company/defendant – for an order that the defendant produce and open for inspection to the plaintiff and/or the plaintiff's agent, one Loh Yoon Thong, an approved company auditor, its accounts and accounting records for the financial years ended 31 December 1999, 2000 and 2001, and up to the month preceding the date of the order prayed for together with all the relevant documents in support of the aforesaid records. The plaintiff also prayed that the said Loh Yoon Thong, who was the plaintiff's brother, be at liberty to take copies of the accounts and accounting records and that the defendant renders the necessary cooperation in the course of such an inspection.

The defendant alleged that the plaintiff had repeatedly used information supplied to him to the detriment of the defendant, and that he had an improper motive against the defendant. The defendant also strenuously objected to the appointment of Loh Yoon Thong, contending that he was a person with a bad reputation and bad motives. The issues requiring determination were whether: (i) the plaintiff, as a director of the defendant, was entitled to the inspection, and whether the defendant had the right to impose a restriction in the form of an undertaking to be given by the plaintiff; and (ii) the defendant could object to the appointment of the company auditor named by the plaintiff to assist him in the undertaking.

Held:

[1] On the facts, there was insufficient evidence that the plaintiff intended to injure the defendant, and mere assumption in the absence of concrete proof would not be sufficient to deny the plaintiff's statutory right to inspect the accounting and other records. Thus, the plaintiff, pursuant to s. 167(3) of the Act, must be allowed to inspect the defendant's accounts and accounting records for the years mentioned, and the defendant's demand for an undertaking from the plaintiff as a condition precedent to such inspection was untenable in law. Furthermore, the condition imposed on the plaintiff, that the defendant's solicitors must be allowed first to go through the records before inspection by the plaintiff would be allowed, was unjustified and without any basis. (p 411 b-e)

[2] On the issue of the appointment of Loh Yoon Thong as an agent to assist the plaintiff to do the inspection, the evidence clearly suggested that the plaintiff required the assistance and expertise of a company auditor to undertake the task of inspecting the voluminous records of the defendant. This court, in an appropriate case, had the discretion to allow an approved company auditor acting for a director under s. 167(6) of the Act to inspect the accounting and other records of a company upon an undertaking given to the court that the information acquired by the auditor during his inspection would only be disclosed to that director. (pp 411 f, h & 412 a)

[2a] With regard to the defendant's severe criticism on the conduct of Loh Yoon Thong as a person with a bad reputation and bad motives, it had not been sufficiently demonstrated, on the facts, to this court that Loh Yoon Thong, as a conduit of the plaintiff, had the intention to abuse the information and materially injure the defendant, and it was unfair to impute any bad motive and intention on his part, and, even worse, to further speculate upon it. (p 412 f-g)

[Application allowed.]

Case(s) referred to:

Conway & Ors v. Petronius Clothing Co Ltd & Ors [1978] 1 All ER 185 ***(refd)***
Edman v. Ross [1922] 22 SR (NSW) 351 ***(refd)***
Funerals of Distinction Pty Ltd [1963] NSWR 614 ***(foll)***
Haw Par Bros (Pte) Ltd v. Dato' Aw Kow [1973] 2 MLJ 169 ***(foll)***
Loh Yoong Thong v. Malaysian Institute of Accountants [2001] 5 MLJ 590 HC ***(refd)***
Welch & Anor v. Britannia Industries Pte Ltd [1992] CSLR Vlli 1002 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 4(1), 167(1), (2), (3), (6)

Companies Act 1936 [NSW], s. 102
Companies Act [Sing], s. 167(3)

Other source(s) referred to:
Walter Woon, *Company Law*, 2nd edn, p 34

For the plaintiff - Gary Leuk (Collin Clerk); M/s Leuk & Partners
For the defendant - Ngeh Koo Ham; M/s Ngeh & Co

Reported by Suresh Nathan

JUDGMENT

Balia Yusof JC:
This is an application made by the plaintiff for an order that the defendant produce and open for inspection to the plaintiff and/or the plaintiff's agent one Mr. Loh Yoon Thong, an approved company auditor, its accounts and accounting records for the financial year ended 31 December 1999, 2000 and 2001 and up to the month preceding the date of the order prayed for together with all the relevant documents in support of the aforesaid records. The plaintiff also prayed that the said Mr. Loh Yoon Thong be at liberty to take copies of the accounts and accounting records and that the defendant, its agents and/or servants render the necessary co-operation in the course of such inspection. The said application is made in pursuance of s. 167 of the Companies Act 1965.

The plaintiff is a director of the defendant and also the chairman. During his absence from the company as a result of an accident, he alleged that certain events has taken place in the company without his knowledge including the removal of the company's secretary, the appointment of a new joint company secretary, the changing of the company's registered address and various other dealings which he was not made aware of. It is the plaintiff's further contention that he was described as a figure head pertaining to the reorganization of the company. In his affidavit in support of the application, the plaintiff further avers that he has made repeated requests for information relating to the matters concerning the company and he expresses fears that several transgressions has been committed by the defendant and that the management of the company has not been done in the best interest of the company and its members and shareholders as a whole. Requests for details of transactions between the defendant and one Complete Profile Management Services Sdn Bhd and transactions including an application for a loan with certain banks in particular has also fallen on deaf ears and as described in para. 14 of the plaintiff's

affidavit in encl. 3, the plaintiff was also denied the various documents and accounting records of the defendant for the years ended 31 December 1999, 2000 and 2002. The plaintiff has also named one Mr. Loh Yoon Thong an accountant, who also happens to be his brother to assist him in inspecting the documents sought for and has also exhibited to this court a letter of undertaking under s. 167(6) of the Companies Act 1965 not to disclose any information acquired during the inspection, except to the plaintiff. The said Mr. Loh Yoon Thong has also filed an affidavit *vide* encl. 6 wherein he refuted the several allegations made against him as to his professional conduct and character as an accountant.

The defendant in opposing this application has filed affidavits in reply *vide* encls. 4, 7 and 9. While it is admitted that the plaintiff is still a director of the defendant, it is the contention of the defendant that the plaintiff was never denied the right of inspection and it was the plaintiff who refused and/or fail to give an undertaking as requested by the defendant. The defendant had in fact fixed a date 26 August 2002 to enable the plaintiff to inspect but the plaintiff failed and has chosen to file this action on 19 August 2002. The defendant further allege that the plaintiff repeatedly used the information supplied to him to the detriment of the company and has jeopardized the position of the defendant. In support of this contention the defendant has exhibited exh. 'YCT2' in encl. 4 pertaining to the conduct of the plaintiff on his involvement with the running of the defendant's affairs which according to the Managing Director of the defendant, has jeopardized the company's credibility and demoralized the staff morale. All those actions are calculated in the defendant's view, as detrimental to the company's interest. In so far as the appointment of Loh Yoon Thong as an agent of the plaintiff to assist him in inspecting the documents, the defendant strenuously object to the appointment on the ground that the appointment of the said Mr. Loh Yoon Thong is not *bona fide* and he is not an easy person to deal with. Certain scathing remarks were also made by the defendant on the character of Mr. Loh Yoon Thong in his dealings as an accountant, which was vehemently denied by the same.

The issue for determination before this court is firstly whether the plaintiff as a director of the defendant is entitled to the inspection which he requested for and whether the defendant has the right to impose such restriction or condition in the form of an undertaking to be given by the plaintiff. Secondly, whether the defendant can object to the appointment of the company auditor named by the plaintiff to assist him in the undertaking.

Before this court, in the course of submissions by both parties, the defendant readily admits that the plaintiff has the right to inspection and rightly so, the defendant's counsel was very magnanimous in so admitting. As was held in *Welch & Anor v. Britannia Industries Pte Ltd* [1992] CSLR Vlli 1002, a directors' right to inspect accounting records flows from his office and he does not have to justify his desire to make an inspection. Walter Woon in his book, *Company Law* 2nd edn at p. 34 said:

> A director need only say that he desires to inspect the accounts in order to fulfill his statutory duty. It would be extremely difficult for a company to refuse inspection in such a case. Of course, if it could be proven that the director in question did in fact abuse the information obtained, he might be sued by the company after the event, but mere suspicion in the absence of concrete proof would be insufficient to deny a director his statutory right to inspect the accounting records.

The right of the director to inspect under s. 167(3) of the Companies Act 1965 is absolute and in referring to s. 167(3) of the Singapore Companies Act which is in *pari materia* with s. 102 of the Companies Act 1936 of New South Wales which again is similar to our s. 167(3) of the Companies Act 1965, Wee Chong Jin CJ in the case of *Haw Par Bros (Pte) Ltd v. Dato' Aw Kow* [1973] 2 MLJ 169 at p. 170 said:

> It is to be observed that our Section 167 is similar to Section 102 of the Companies Act 1936 New South Wales. In the final analysis, however, the meaning ie the intention of the legislature is primarily to be sought in the words of the section itself read with the statute as a whole. It seems to us clear that Section 167(3) gives an absolute right to inspect the accounting and other records required to be kept by a company and its directors under Section 167(1) only to persons who are the then directors of the company.

As to the meaning of accounting records, s. 4(1) of the Companies Act 1965 clearly includes invoices, receipts, order for payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents as are necessary to explain the methods and calculations by which accounts are made up. This definition is couched in a manner whereby the documents referred to is certainly not exhaustive and it is certainly no defence to the defendant to contend that because the documents sought for inspection by the plaintiff is voluminous and are of various types and categories and thus it is not possible for the defendant to comply with the request. It is also no defence to the defendant to say that they may not be in possession of such records, for s. 167(1) of the Companies Act 1965 clearly imposes an obligation on the defendant to keep such accounting and other records in such manner as to

enable them to be conveniently and properly audited. And these records sought by the plaintiff for the years ended 31 December 1999, 2000 and 2001 are well within the stipulated period of seven years under s. 167(2) of the same.

The right of the plaintiff to inspect the accounting and other records of the company is a statutory right. However it does not mean that this right is without limitations and restrictions. As stated by Street CJ in the Australian Case of *Edman v. Ross* [1922] 22 SR (NSW) 351:

> The right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director's duties, and, though I am not prepared to say that the court might not restrain him in the exercise of this right if satisfied affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company, it is true nevertheless, that its exercise is, generally speaking, not a matter of discretion with the court and that he cannot be called upon to furnish his reasons before being allowed to exercise it.

It is alleged by the defendant that the plaintiff has abused the information given to him and has also injured the position of the defendant and to this effect exh. YCT2 in encl. 4 was referred to as instances where the plaintiff has breached his fiduciary duty as a director of the defendant. I have examined closely exh. YCT2 in the said enclosure and am of the view that what has allegedly been referred to as improprieties or improper conduct of the plaintiff are actually a narration of events which show the differences between the plaintiff and the defendant which in my view are not sufficient evidence to indicate that there is improper motive against the company. Any improper motive or conduct of the plaintiff in seeking to inspect the records of the company must be an improper motive against the company *per se* and not against the other directors or members of the company. As has been said by the learned Judicial Commissioner in *Welch & Anor v. Britannia Industries Pte Ltd (supra)* in referring to a passage in *Conway & Others v. Petronius Clothing Co. Ltd & Ors* [1978] 1 All ER 185:

> Though a director will not in general be called upon to furnish his reasons before being allowed to exercise his right of inspection the court would in my judgment in such a case restrain him in the exercise of such right, if certified affirmatively that his intention was to abuse the confidence reposed in him as director and particularly to injure the company. In my judgment, however, in the absence of clear proof to the contrary, the court would in such a case assume that he was exercising it for the benefit of the company.

It was held in the above case that a mere intention to wrest control of the company from another shareholder could not be regarded as an intention to injure the company. In the instant case, the mere fact that the plaintiff had some differences with the other directors in the management of the company could not in my view be taken as an intention to injure the company. The plaintiff has asked many questions and sought for explanations and further details about certain transactions of the company and these alone can never be regarded as an intention to abuse the confidence reposed in him and materially to injure the company. There must be evidence before this court that the plaintiff's intention is to injure the defendant. Mere assumption in the absence of concrete proof would not be sufficient to deny the plaintiff's statutory right to inspect those accounting and other records. The fact that the plaintiff's action antagonizes the defendant's management is insufficient ground to deny his right under the law and whatever hidden agenda that the plaintiff may have is in itself a mere speculation by the defendant. The defendant never knew what that hidden agenda is, let alone this court.

In the circumstances of the case, I therefore hold that the plaintiff must be allowed to inspect the defendant's accounts and accounting records for the years above mentioned and the defendant's demand for an undertaking from the plaintiff as a condition precedent to such inspection is untenable in law. I further hold that the condition imposed on the plaintiff that the defendant's solicitors must be allowed first to go through the documents/records before inspection by the plaintiff be allowed is also unjustified and without any basis.

On the issue of the appointment of Mr. Loh Yoon Thong to be an agent and to assist the plaintiff to do the inspection, the evidence produced before this court clearly suggest that the plaintiff requires the assistance and the expertise of a company auditor to undertake the task of inspecting the voluminous records of the defendant. The plaintiff has also demonstrated to this court certain errors in the accounts of the defendant for the year ended 31 December 2000 which was passed by the Board of the defendant. These errors were only detected with the assistance and the expertise of the said Mr. Loh Yoon Thong who is a qualified company auditor and an accountant by profession. The mere fact that the plaintiff himself is an accountant does not by itself disqualify him from obtaining an assistance by another accountant. The plaintiff also carries no burden of proving any wrong doing or fraud in respect of the accounts and the records sought to be inspected before he should be allowed to do so. In this respect, this court in an appropriate case has the discretion to allow an approved company auditor acting for a director under s. 167(6) of the Companies Act 1965 to inspect the accounting and other records of a company

upon an undertaking given to the court that the information acquired by the auditor during his inspection shall not be disclosed by him except to that director. Reading the said provision, I find nothing therein to suggest that the section envisages only a director who is not an accountant himself may be allowed to appoint a company auditor to assist him as submitted by the learned counsel for the defendant. To adopt such an interpretation would in my view be straining the words and meaning of that provisions and there is no justification for this court to do so. It was further contended by the learned counsel that art. 146 of the defendant's Article of Association allows only a director to look at the accounts and documents of the company and thus Mr. Loh Yoon Thong is therefore disqualified. My short answer to this submission goes back to s. 167(6) of the Companies Act 1965 and suffice for me to say that the said statutory provision must be held to prevail over the Article of Association of the company.

Together with the abovementioned reasons, the defendant in its attempt to prevent the said Mr, Loh Yoon Thong from assisting the plaintiff in the inspection, has leveled severe criticisms on the conduct of Mr. Loh Yoon Thong as a person with a bad reputation and bad motives. In substantiveting that fact, the defendant has averred in encl. 4 certain instances and transactions indicating Mr. Loh Yoon Thong's reputation including a disciplinary action by the Malaysian Institute of Accountants. By way of reply Mr. Loh Yoon Thong has through encl. 6 filed an affidavit to deny the said averments which he describes as fabrications and falsehoods and that the matter is still pending in court proceedings. At the same time in respect of the disciplinary action taken against him by the Malaysian Institute of Accountants he has referred to the reported case of *Loh Yoon Thong v. Malaysian Institute of Accountants* [2001] 5 MLJ 590 which vindicated him. With regard to this objection of the defendant, I need only say that it has not been sufficiently demonstrated to this court that Mr. Loh Yoon Thong as a conduit of the plaintiff has the intention to abuse the information and materially injure the defendant and it is unfair to impute any bad motive and intention on his part and worst still to speculate on that. In respect of the disciplinary action I think, he has been vindicated and on the other allegations leveled against him which is the subject matter of a pending civil suit, one must abide by the sanctity of the principle that a man shall not be condemned until he has been proven guilty of his misdeeds. He too, *via* exh. "LYS15" in encl. 3 has given an undertaking pursuant to s. 167(6) of the Companies Act 1965, even before this court so orders.

Having considered the whole circumstances of the case and the evidence produced before me and to borrow the words and following the reasoning of Jacobs J in *Funerals of Distinction Pty Ltd* [1963] NSWR 614, referred to in *Haw Par Bros (Pte) Ltd v. Dato' Aw Kow (supra)*, I am of the similar view that s. 167(6) is in aid of the absolute right of a director under s. 167(3) and it would need a very strong case to be made out to refuse an order under s. 167(6). I accordingly allow an order in terms of the application and further order that the named company auditor, one Mr. Loh Yoon Thong give an undertaking in writing to this court pursuant to s. 167(6) of the Companies Act 1965.